IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL SIDE JURISDICTION

Arbitration Application No.191 of 2006

Mrs Shobha Raj Anand
Indian Inhabitant, residing at G-2
Gold Crown Apartment
Seven Bungalows, Versova
Andheri (W) Mumbai 40006l ..Applicant

vs

1. Mr. Virendrapalsingh Basantsingh Kohli
Indian Inhabitant, permanently residing
at Subhan Karoti Apartment, Awade
Field, Ichalkaranji, Taluka Hatkanangle
District Kolhapur
and
temporarily residing at Flat no. 2
Ground floor, Plot No.692, Casabella
Coop Housing Society Ltd, Khar Pali
Road, Khar, Mumbai 400052

2.Mr. Jagmohansingh Basantsingh Kohil
Indian Inhabitant, permanently residing
at Kholi House, Shaheed Bhagat Singh
Society, Andheri East Mumbai
and
temporarily residing at Flat no. 2
Ground floor, Plot No.692, Casabella
Coop Housing Society Ltd, Khar Pali
Road, Khar, Mumbai 400052 .. respondents

Mr A Dasgupta i/b Ms. Mangal V Shinde for the applicant.
Mr S.K. Chaurasia i/b Mr. A.M. Saraogi for respondents.

CORAM: SWATANTER KUMAR,C.J.

Judgment reserved on 27th July 2007
Judgment delivered on 17th August 2007

JUDGMENT:

The parties executed a Memorandum of Understanding (MOU) dated 24th February 2004 for purchase of property viz., G-2 Gold Crown Apartment, Seven Bungalows, Versova, Andheri (West), Mumbai by the applicant from the respondents. According to the applicant, respondent Nos. 1 and 2 had represented to the applicant that their mother Smt. Daljit Kaur Basantsingh Kohli died at Kolhapur on 6th May 2000 leaving behind her three sons i.e. Respondent Nos. 1 and 2 and one Mr. Narendrasingh Basantsingh Kohli as the only legal heirs. Vide her Will and Testament dated 16th March 2000 Smt. Daljit Kaur Basantsingh Kohli had bequeathed the flat in question in favour of the respondents and thus they had absolute right to sell the said property. This resulted in execution of the MOU between the parties and one of the conditions was that the respondents were to obtain probate of the Will dated 16th March 2000. Respondent Nos. 1 and 2 had filed Probate Petition No.259 of 2001 for obtaining letter of administration on 29th June 2004. This Court, on 25th

November 2004 granted the probate of the Will in favour of the respondents, however, the applicant got in touch with the respondents in December 2004 for completing the sale deed in terms of clause 5 of the MOU. The applicant also offered to pay the balance sale consideration after deducting Rs.2.50 lacs paid to M/s Jhangiani, Narula and Associates on behalf of the respondents in terms of clause 4 of the MOU. Despite the fact that the applicant had paid Rs.5.60 lacs out of the total consideration of Rs.40 lacs to the respondents, the respondents, without any reason, failed to convey the property to the applicant. In the meanwhile, Mr. Narendrasingh Kohli filed Misc. Petition for revoking the agreement. By consent, the letter of administration in favour of respondent Nos. 1 and 2 is stated to have been revoked. On the contrary, the learned counsel appearing for respondent Nos.1 and 2 stated before the court that they would not part with the possession of the land. The applicant, vide his advocate's notice dated 19th September 2006, called upon them to complete the transaction within 7 days from the date of receipt of the notice. The applicant, besides informing respondent Nos. 1 and 2 that she was willing to take undivided share of the property, also stated that if the respondents were not willing to do the needful, the dispute be

referred to the arbitrator in accordance with clause 11 of the MOU and also appoint Justice Ms K.K. Baam.

2. On 6th October 2006, a reply was received from the respondents, in which it was stated that the MOU signed between the parties stood automatically terminated and cancelled because the probate had been revoked. While denying these allegations the applicant on 12th October 2006 sent a reply to the reply dated 6th October 2006 sent by the respondents stating that she was willing to take undivided share of respondent Nos. 1 and 2 in the said property upon paying the balance sale consideration as per the MOU. The respondents did not agree to that request, resulting in the filing of this application under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for enforcement of the arbitration agreement and for appointment of a sole arbitrator.

3. In the reply filed on behalf of the respondents, the facts are not really controverted. However, it is stated that the MOU stood superseded and automatically cancelled. The disputes sought to be raised by the applicant were beyond the scope of the MOU as

they were in the nature of a modified contract. It is also averred that after signing the MOU, steps were taken to obtain probate and it is submitted that for these reasons, the application should be dismissed. As is evident from the above pleadings of the parties, the principal ground taken while opposing the prayer in the application is that the MOU dated 24th February 2004 stood superseded because the probate was revoked. There is no denial to the fact that the MOU dated 24th February 2004 was duly signed by the parties and parties thereto intended to fulfill their obligations thereunder. Clause 11 of the MOU reads as under:

> "In case of disputes or differences arising between the parties hereto in connection with these presents, the same shall be referred to arbitration of the Sole Arbitrator to be mutually agreed by both the parties in accordance with the provisions of Arbitration and Conciliation Act, 1996 and the Award given by such Arbitrator shall be binding on the parties hereto".

4. A bare reading of the arbitration clause shows that any disputes arising between the parties to the MOU were to be referred to the arbitration of a sole arbitrator mutually agreed between them. That is not a restricted clause of arbitration. The disputes raised

by the applicant are that she was entitled to have the property conveyed in her favour in terms of the MOU, if not whole, at least to the extent of the share of respondent Nos. 1 and 2. In the alternative it is submitted that the applicant would be entitled to refund of moneys with interest and other benefits. Thus, in short, the claims of the applicant are denied by the respondents. Mere fact that by consent of parties respondent Nos. 1 and 2 got probate granted in their favour and it stood revoked and made voluntary statement before the court that they would not part with the possession of the property would again be a dispute which should be gone into by the arbitrator, particularly keeping in view the ambit and scope of section 16 of the Act. If one of the terms of the MOU has not been fulfilled in its entirety or in the alternative after it was satisfied that the same has been revoked temporarily, this may not entirely absolve respondent Nos. 1 and 2 of their obligation under the MOU, particularly in view of the stand taken by the applicant that she is prepared to pay the undivided share of respondent Nos.1 and 2 in terms of the MOU. There is nothing on record to show that subsequently or even by necessary implication, the parties intended to or have actually superseded the MOU. Any unilateral act is incapable of

destroying the mutual contract between the parties, unless such a power or right was specifically granted under the terms of the contract. This is not the situation here. There is no merit in the objections raised on behalf of the respondents. The disputes are covered under the arbitration clause and the said arbitration clause is neither being superseded nor frustrated by any document executed between the parties.

5. Resultantly, this application is allowed, leaving the parties to bear their own costs. Shri B.V. Chavan, retired Judge of this court is appointed as the sole arbitrator in terms of the arbitration clause 11 of the MOU to adjudicate the disputes and differences arisen between the parties. The arbitration proceedings may be completed expeditiously.

The Prothonotary and Senior Master to communicate this order to the learned arbitrators.

CHIEF JUSTICE